

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Temporary Immediate
Suspension of the Family Child Care
License of Peggy Hewitt.

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing on September 15, 2003, in Luverne and by telephone conference on December 15, 2003. Terry Vajgrt, Assistant Rock County Attorney, 120 North McKenzie, P. O. Box 1538, Luverne, Minnesota 56156-0538, represented the Department of Human Services and the Rock County Family Services Agency ("Local Agency"). Mark G. Kurzman, Esq., Kurzman, Grant & Ojala, 219 Southeast Main Street, Suite 403, Minneapolis, Minnesota 55414, represented Peggy Hewitt ("Licensee").

The Hearing in Luverne concluded with the parties arriving at a Proposed Settlement, which was reduced subsequently to a written Settlement Proposal and forwarded to the Department of Human Services for review. The Settlement was rejected on December 2, 2003, by means of a written determination from Jerry Kerber, Director of the Licensing Division of the Minnesota Department of Human Services. As a result of the rejection of the Settlement Agreement, the Administrative Law Judge reconvened this matter on December 15, 2003. The record closed on that date.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Human Services will make a final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusion, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the Office of Kevin Goodno, Commissioner, Department of Human Services, 444 Lafayette Road, St. Paul, Minnesota 55155 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or

upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUE

Should the temporary immediate suspension of Peggy Hewitt's Family Child Care License remain in effect because there is reasonable cause to believe that there is an imminent risk of harm to the health, safety or rights of children in the license holder's care?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. At the hearing on December 15, 2003, counsel for the Licensee stipulated to all the factual allegations in Exhibit A, which document was attached to and incorporated by reference into the Notice of and Order For Hearing issued in this matter on June 11, 2003. Exhibit A, attached to this report, is incorporated into these Findings of Fact and made a part thereof. Counsel specifically did not stipulate that allowing the Licensee to operate her facility creates imminent risk of harm to children in her care, in light of the Licensee's actions taken under the Proposed Settlement described in the next Finding.

2. Under the Proposed Settlement, the Licensee took immediate steps to ensure that her son would not be present in the Licensee's facility during the operation of her daycare or at any time when a daycare child was present, and proposed to provide to the Rock County Family Service Agency a schedule outlining the provision of care for her son evidencing that he will not be in the home at any time when daycare children are present. All efforts would be made by Ms. Hewitt and the large support group of friends she has in Luverne who were willing to take care of her son at any time he is not in school to avoid inadvertent contact between Ms. Hewitt's son and daycare children. Ms. Hewitt agreed also to provide to all parents receiving daycare services a notice concerning past maltreatment on the part of her son, which notice informs all parents that her son was responsible for the maltreatment of a child at her facility, and that the maltreatment determination followed allegations that the son inappropriately touched a child under Ms. Hewitt's care. Ms. Hewitt also agreed to sign any and all releases requested by the County Family Service Agency for information on the treatment and care of her son at the facilities contemplated for his continued counseling. It was contemplated by the settlement that Ms. Hewitt would continue operating her daycare facility under a conditional license, which license specified the conditions noted in this Finding.

3. On December 2, 2003, the Minnesota Department of Human Services's Licensing Division rejected the Proposed Settlement. Specifically, the Director of the Division noted that the Department was unable to agree that the Proposed Settlement Agreement was in the best interest of children, in that it did not sufficiently diminish the

risk of further harm to children in care. The Department noted that it had yet to see a satisfactory arrangement that can allow the co-existence of a household member with a history of multiple incidents of sexual contact with children in care and a resumption of the in-home child care service. Director Kerber noted that “Of very significant concern is that at the time of the son’s second known incident of sexual contact with a child in care, the license holder was aware of the first incident and both parents were at home”.

Based upon the above Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Any of the above Findings more properly termed Conclusions are hereby adopted as such.

2. The Administrative Law Judge and the Minnesota Department of Human Services have jurisdiction in this contested case pursuant to Minn. Stat. §§ 14.50, 245A.07 and 245A.08.

3. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled.

4. Pursuant to Minn. Stat. § 245A.07, subd. 2, “[i]f the license holder’s actions or failure to comply with applicable law or rule poses an imminent risk of harm to the health, safety, or rights of persons served by the program, the Commissioner shall act immediately to temporarily suspend the license.”

5. At a hearing regarding a license sanction under Minn. Stat. § 245A.07, the Commissioner may demonstrate reasonable cause for action taken by submitting statements, reports or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable law or rule.^[1]

6. In this matter, the Administrative Law Judge is limited to a determination of “whether the temporary immediate suspension should remain in effect pending the Commissioner’s final order under § 245A.08.”^[2]

7. The Department in this matter is required to demonstrate “reasonable cause exists to believe that the license holder’s actions or failure to comply with applicable law or rule poses an imminent risk of harm to the health, safety, or rights of persons served by the program.”^[3]

8. The Department has demonstrated reasonable cause for the temporary immediate suspension and that the suspension should remain in effect because there is a risk of imminent harm to the health and/or safety of children served by the Licensee.

9. The attached Memorandum is incorporated by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the temporary immediate suspension of the Family Child Care License of Peggy Hewitt be AFFIRMED.

Dated this 29th day of December, 2003.

/s/ Richard C. Luis

RICHARD C. LUIS
Administrative Law Judge

Reported: Taped. No transcript prepared.

NOTICE

Under Minn. Stat. § 14.62, subd. 1, the Department of Human Services is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

In stipulating to the factual allegations noted in Exhibit A attached to the Notice of and Order for Hearing, counsel for Ms. Hewitt left in issue the question of whether an imminent risk of harm to the health, safety or rights of children in the license holder's care still exists, particularly given the terms of the Proposed Settlement. The Administrative Law Judge has concluded that such an imminent risk still exists.

Under the Settlement Agreement submitted to the Department of Human Services, Ms. Hewitt agreed to observe certain conditions for reinstatement of her license. They included that she should take immediate steps to ensure that her son, M.H., not be present in her residence during the operation of the daycare or at any time while a daycare child was present, and that she would provide to the Local Agency a schedule outlining the provision of care for M.H. evidencing that M.H. will not be in the home at any time when daycare children were present, that she would provide to all parents receiving daycare services a notice concerning past maltreatment by M.H., and that she would sign any and all releases requested by the Local Agency relating to the treatment and care of M.H. at Great Plains Psychological Services and/or Central Plains Clinic. The ALJ notes that these were the same conditions agreed to by the parties at the hearing in Luverne on September 15, and that he issued a letter the following week to the Commissioner recommending that a Settlement Proposal containing the terms outlined herein should be approved.

Subsequent events have led the Administrative Law Judge to conclude that his earlier-stated opinion on the appropriateness of lifting the Temporary Immediate Suspension is no longer operative. The same issues were before the Commissioner in considering the proposed Settlement Agreement filed on September 29, 2003, and the Commissioner has, for reasons specified, rejected the Proposed Settlement. The Administrative Law Judge concludes that he is bound by that determination.

When interim proceedings result in the resolution of issues, the doctrine of the “law of the case” comes into play. In the case of Mattson v. Underwriters at Lloyd’s of London, 414 N.W.2d 717 (Minn. 1987) appellate review was refused because the doctrine of the law of the case precluded relitigation of an issue previously decided on appeal in the same matter. In this case, the issue of whether the conditions proposed by the Settlement Agreement upon Ms. Hewitt removed any “imminent risk of harm” has been reviewed and resolved by the Commissioner’s order, and the Commissioner’s order on that issue for the purposes of temporary immediate suspension has become the law of the case to be followed now. It is noted that the issues remain subject to review under Minn. Stat. § 14.63, once there is a final decision in this matter.

R.C.L.

^[1] Minn. Stat. § 245A.08, subd. 3.

^[2] Minn. Stat. § 245A.07, subd. 2a.

^[3] Minn. Stat. § 245A.07, subd. 2a.